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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

BARRY LOUIS LAMON,

Defendant and Appellant.

F057975

(Super. Ct. No. 06CM7367)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Timothy S. Buckley, Judge.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Ardaiz, P.J., Levy, J. and Gomes, J.

STATEMENT OF THE CASE¹

On August 29, 2006, an information was filed in Kings County Superior Court, charging appellant Barry Louis Lamon with felony battery by gassing, while confined in state prison, upon a nonconfined person (Pen. Code,² § 4501.5), with four prior strike convictions (§ 667, subds. (b)-(i)) and two prior prison term enhancements (§ 667.5, subd. (b)). On October 25, 2006, the trial court dismissed one prior strike conviction, and appellant proceeded to jury trial. On October 27, 2006, the jury found him guilty, and found the three prior strike conviction and two prior prison term enhancement allegations true. On December 13, 2006, the court imposed the third-strike term of 25 years to life, plus two consecutive one-year terms for the prior prison term enhancements, to be served consecutively to the life term appellant was already serving.³

On January 12, 2009, this court affirmed the section 4501.5 conviction, the true findings on the prior prison term enhancements, and the true findings on the murder and attempted murder strike convictions. We found, however, a failure of proof that appellant's prior conviction for aggravated assault was a serious or violent felony. Accordingly, we reversed the true finding on that allegation and the sentence imposed, and, after determining that neither double jeopardy nor due process principles barred the presentation of additional evidence concerning whether the prior conviction was a serious or violent felony, remanded the matter for further proceedings.

¹ Portions of the statement of the case and the facts, *post*, are taken from our prior opinion in this case.

² All statutory references are to the Penal Code unless otherwise stated.

³ On January 15, 1997, appellant was sentenced in Los Angeles County Superior Court to a term of 7 years 4 months plus 25 years to life for murder with the personal use of a firearm and attempted murder with the personal use of a firearm and personal infliction of great bodily injury.

On June 2, 2009, the People announced that they did not intend to retry the strike allegation. The court, noting that two valid prior strike convictions remained, sentenced appellant to two consecutive one-year terms for the prior prison term enhancements, plus 25 years to life, and ordered that the sentence run consecutively to that in appellant's Los Angeles County case. The court further imposed a \$1,000 restitution fine (§ 1202.4), a \$1,000 restitution fine that was stayed pending successful completion of parole (§ 1202.45), and a \$20 court security fee (§ 1465.8). The issue of victim restitution was reserved. Noting that the offense occurred prior to the enactment of Government Code section 70373, the court did not impose a court facilities funding assessment. The court awarded no custody credits for this offense. Appellant filed a timely notice of appeal.

FACTS

On February 25, 2006, correctional officers Daniel Fierro and Luis Urena were collecting breakfast trays from inmates at Corcoran State Prison. When they went to collect the tray from appellant, a liquid substance was thrown out of the cell and struck Fierro on the side of the face. Appellant was the sole occupant of the cell. When Urena ordered appellant to submit to restraints, appellant reached into the cell's toilet with a cup and then turned toward the cell door. Believing appellant was about to throw the liquid at him, Urena sprayed appellant with pepper spray.

Appellant testified that when he refused to relinquish his food tray, Urena sprayed him with pepper spray and ordered him to approach the cell door. Appellant complied, but Urena sprayed him again. Appellant then threw down his tray and tried to hide under his bunk. He denied throwing any liquid out of his cell or scooping liquid out of the toilet.

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also

includes the declaration of appellate counsel, stating that appellant was advised he could file his own brief with this court. By letter dated November 10, 2009, we invited appellant to submit additional briefing. To date, he has not done so, although he did request that new counsel be appointed for him on appeal. His request was denied.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.